

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement  
(916) 322-5662 322-5660 322-5901 322-6441

May 6, 1985

Maurice F. O'Shea  
City Attorney  
City of Paramount  
16400 Colorado Avenue  
Paramount, CA 90723-5091

Re: Your Request for Advice  
Our File No. A-85-065 - /

Dear Mr. O'Shea:

This letter is sent in response to your request for advice on behalf of Councilmember Gerald Mulrooney concerning his obligations under the conflict of interest provisions of the Political Reform Act of 1974<sup>1/</sup> and a proposed city ordinance which would impose a business license tax on the operator and exhibitors at the Paramount Swap Meet. I have received additional information from William Holt, City Manager, from Beryl Weiner and Joel Grossman on behalf of the City of Paramount, and from Robert S. Bower on behalf of Modern Development Company, operator of the Paramount Swap Meet.

As I indicated in my letter of April 4, 1985, there are several issues of material fact on which the City representatives and Mr. Bower do not agree. We will advise Councilmember Mulrooney pursuant to Section 83114(b) based on the facts provided to us by the City representatives, but we note that there are areas of dispute.

### FACTUAL BACKGROUND

1. Councilmember Mulrooney's Economic Interests.  
Councilmember Mulrooney is a beneficiary and successor trustee of a family trust; his mother is presently the sole trustee. The trust owns commercial property located across the street

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<sup>1/</sup> The Political Reform Act is contained in Government Code Sections 81000-91015. All statutory references are to the Government Code.

from the Paramount Outdoor Market Center (aka Paramount Swap Meet). The property is improved with a building, and space is leased to Paramount Bike Shop, a clothing store, a video rental firm, and Mulrooney, Inc. (warehouse space).

In your request for advice dated March 12, 1985, it was stated:

5. Councilman Mulrooney is a Schwinn dealer operating in another City, however, he sells bicycles to the lessee of the trust property which is across the street from the swap meet.

\* \* \*

8. Councilman Mulrooney's records reflect approximately 25 bikes are sold to lessee annually. His dealership sells 7,000 to 8,000 bicycles a year.

In a letter from Councilmember Mulrooney dated April 15, 1985, he further explained as follows:

I also wish to clarify my very limited relationship to the Paramount Bike Shop. At one time I owned the Bike Shop, and I sold it to Mr. Velasco in 1978 for \$46,200.00. The sale was on a three-year note, which was fully paid in two years. Mr. Velasco and I are both independent bike dealers. Very occasionally, we will swap bicycles with each other, a very common practice in the bicycle business, when one of us has a bicycle that the other needs. No cash is involved in such transactions, which are conducted solely for the benefit and convenience of our customers. I engage in such swaps with other retailers as well. I am a retailer, and not a wholesaler. On one occasion I purchased four bicycles I needed from the Paramount Bike Shop when they were overstocked.

It is our understanding that Councilmember Mulrooney does not have any other economic interests which could potentially be affected by any City decisions concerning the Paramount Swap Meet.

2. Paramount Swap Meet. Paramount Swap Meet is owned and operated by Modern Development Company. It is open 7 days a week; exhibitors or vendors rent space from the operator on a daily basis at an average cost of \$5 to \$15 per day. Many of the exhibitors come on a regular basis. During the first six

months of 1984, there were approximately 500 exhibitors a day. There are a few regular exhibitors which sell bicycles and bicycle parts and accessories. In the letter from Mr. Weiner dated April 15, 1985, he stated that the bicycles offered for sale at swap meet were not of the same type or quality as offered at Paramount Bike Shop.

3. Proposed City Ordinance. Presently by city ordinance (Chap. 26, Article I, Section 26-1 and Article II Section 26-55 of the Paramount Municipal Code), Paramount Swap Meet pays a business license fee of \$1,000 semi-annually. In addition, it pays \$6 semi-annually per average participant (defined as the total number of participants in a swap meet per half year divided by 26 weeks). For the first six months of 1984, Paramount Swap Meet paid a total of \$22,042 pursuant to this ordinance.

Pending before the City Council is a proposal to amend this ordinance and to require a business license tax of \$1,000 semi-annually plus a daily business tax of \$1 per exhibitor per day. In addition, the proposal provides that each exhibitor shall pay a daily business tax of \$1 per day. Under this proposal, Paramount Swap Meet would pay approximately \$92,000 semi-annually (based on the average of 500 exhibitors per day for the first six months of 1984). Under the proposed ordinance, the operator is required to collect the city tax from the exhibitors.

Modern Development Company, the owner and operator of Paramount Swap Meet, is opposed to the adoption of this ordinance.

#### DISCUSSION

Under the Political Reform Act, a public official may not make, participate in, or use his official position to influence a governmental decision in which the official knows or has reason to know he has a financial interest. Section 87103. An official has a financial interest in a decision when it is reasonably foreseeable that the decision will have a material financial effect on:

\* \* \*

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

Maurice F. O'Shea  
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(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made....

Section 87103.

An official is considered to have an interest in real property held by, and sources of income to, a trust in which he has a 10% or greater direct, indirect, or beneficial interest. Sections 82030, 82033 and 82034. Under the circumstances described, Councilmember Mulrooney has a greater than 10% interest in the family trust. See 2 Cal. Adm. Code Section 18234 (copy enclosed). Accordingly, he has an interest in the trust's real property, and in sources of income to the trust (i.e., the building tenants). Therefore, he may not participate in a Council decision which it is reasonably foreseeable that the decision could have a material financial effect on the value or income producing potential of the trust's real property or on any of the building tenants.

Whether any particular effects of a decision are reasonably foreseeable depends generally on whether there is a substantial probability that the effects will occur; certainty is not required nor is speculation enough. Thorner Opinion, No 75-089, 1 FPPC Opinions 198, December 4, 1975. Normally the intended effects of a decision are deemed reasonably foreseeable. Oglesby Opinion, No. 75-083, 1 FPPC Opinions 71, July 2, 1975. This is true even if there is a question as to whether it is reasonable to think that the decision will accomplish its goal. In addition, any effects which are logically and reasonably consequential upon a decision are considered reasonably foreseeable.<sup>2/</sup>

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<sup>2/</sup> Mr. Bower has asserted repeatedly that the intent of the proposed ordinance is not just to raise revenue for the City but to drive the swap meet out of business. We do not know this. If Councilmember Mulrooney believes that the ordinance will or is intended to have this effect, then the effect would be foreseeable for purposes of our analysis.

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The issue of materiality is closely related to the issue of foreseeability. In Commission Regulation, 2 Cal. Adm. Code Section 18702, provides monetary guidelines with respect to an effect on real property (copy attached). In addition to the monetary guidelines, the Commission has advised that the effect of a decision on real property is considered material if the decision will otherwise cause a significant effect on the use, value or enjoyment of the property.

Monetary guidelines for measuring the materiality of an effect upon a business entity are provided in the newly adopted Regulation 2 Cal. Adm. Code Section 18702.2, (copy enclosed). If the effects of a decision cannot be quantified, then the effect is considered to be material if it is significant. 2 Cal. Adm. Code Section 18702(a).

The proposed ordinance does not regulate or pertain directly to the trust property or the building tenants. Thus the relevant two questions are: (1) whether the effect of the ordinance would be to close or substantially reduce the swap meet; and (2) whether the closing or reduction of the swap meet operation would have a material effect on the value of the trust property or the business of any of the building tenants. As I have indicated to all of the concerned parties on several occasions, I cannot independently judge the answer to the first question. While, under the proposal, the amount of tax paid by the operator will substantially increase, it does not necessarily follow that it will put the swap meet out of business. Furthermore, it seems reasonable to conclude that while the tax on the vendors or exhibitors is new, it is not so substantial as to drive the vendors away to other swap meets. On the other hand, Moden Development Company and the President of the Swap Meet Owners Association are of the opinion that the ordinance will have disastrous effects on the Paramount Swap Meet. Since both points of view seem entirely reasonable, and since it is not the role of the Commission on an advice request to act as a trier of fact, I cannot say which is "reasonably foreseeable." Therefore, I can only tell you what the implications of both conclusions are.

If the swap meet were to shut down as a result of the adoption of the business tax ordinance, both Mr. Bower and the City representatives agree that traffic patterns and parking availability in the immediate area would be significantly affected. This seems logical since the exhibitors and the swap meet customers would no longer be frequenting the area on a daily basis. If such a change in the traffic and parking situation would significantly affect either the value of nearby

property or the value of the tenant businesses based on increased access and improved aesthetics or, alternatively, based on a decrease in potential customers, Councilmember Mulrooney would have a conflict of interest and should not participate in the decision on the ordinance. On the other hand, if the change would not significantly affect the value of the property or the tenant businesses, Councilmember Mulrooney would not have a conflict of interest. It should be noted, however, that in the Owen Opinion, No. 76-005, 2 FPFC Opinions 77, June 2, 1976, the Commission found that a downtown plan which called for changes in traffic patterns, an increase in parking areas, and the replacement of residential rental units with commercial development would have a material effect on the value of commercial property in the downtown area. In the Brown Opinion, No. 77-024, 4 FPFC Opinions 19, Feb. 7, 1978, the Commission found that parking and street beautification projects would materially affect the value and income producing potential of nearby commercial property.<sup>3/</sup>

On the other hand, if the swap meet would not be closed or substantially reduced by the ordinance, then it appears unlikely that the ordinancee would have a material effect on the surrounding properties and businesses.

I should like to note two points in response to some of the comments in the submissions to me. First, the Act does not require for disqualification only when an official will be personally benefited by a decision. The statute requires disqualification whenever a decision will have a material financial effect on a business in which the official has an investment, on the official's real property, or on a source of income, regardless of whether the decision will affect the value of the official's investments or the amount of income received by the official. Section 87103. Second, the statute speaks of an effect of a decision, not simply a benefit to an official. Therefore, an official must disqualify himself or herself when a

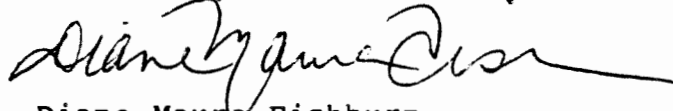
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<sup>3/</sup> Both in the Owen and the Brown Opinions, the Commission held that all or most commercial property owners in a city are not a significant segment of the general public. However all or most retail business owners in a city may be considered a significant segment of the public. Owen Opinion. In this situation, it is not clear if all or most retail businesses would be affected in the same way by the closing of the swap meet as those businesses in the immediate vicinity.

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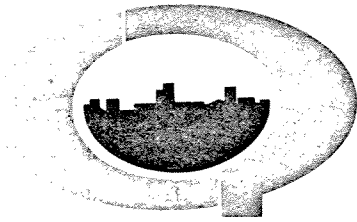
decision will have a material financial effect, whether  
beneficial or detrimental, on the official's interests.

Sincerely,

A handwritten signature in cursive script, reading "Diane Maura Fishburn". The signature is written in dark ink and is positioned above the typed name.

Diane Maura Fishburn  
Staff Counsel  
Legal Division

DMF:plh  
Enclosures



## CITY OF PARAMOUNT

GERALD A. MUIROONTY  
Mayor  
CHARLES R. WELDON  
Vice Mayor  
CASE BOOGAARD  
Councilmember  
ESTHER C. CALDWELL, J.D.  
Councilmember  
JOHN A. MILLS  
Councilmember

MAR 13 10 35 AM '85

March 12, 1985

State of California  
Fair Political Practices Commission  
P.O. Box 807  
Sacramento, CA 95804

Attention: Diana Fishburn

Re: City of Paramount  
Request for Advice

Dear Ms. Fishburn:

This letter is being written after our telephone conversation on March 11, 1985 seeking an opinion as to whether a conflict of interest arises under the following factual situation:

1. The City of Paramount, a general law city, is contemplating a business license tax to be required on all vendors individually participating in a regularly conducted swap meet in the City. (A Drive-In Theatre)

The swap meet has been operating for years in the City. The operator has been subjected to a business license fee.

Previously the operator also paid a swap meet vendor fee of \$6.00 semi-annually based on the average participant occupancy of vendor spaces.

2. The proposed license tax is scheduled, per vendor, per day, as follows:

Monday, Wednesday, Thursday & Friday	\$2.50
Tuesday, Saturday & Sunday	\$5.00
Between Thanksgiving & Christmas	\$5.00



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FAIR POLITICAL PRACTICES COMMISSION  
ATTENTION: DIANA FISHBURN  
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3. A regular vendor at the swap meet sells bicycles.
4. Councilman (Mayor) Mulrooney is a beneficiary of a family trust. (A-B Trust) The family trust owns property across the street from the swap meet property.

The Councilman's father is deceased; his mother is presently sole trustee. Councilman is also successor trustee only, with no present powers.

The subject trust property is in the process of vesting one-half in revocable trust of surviving mother of Councilman; one-half in irrevocable trust.

The trust property is rented to an uninvolved lessee; straight rent is paid. (No increase in rent is involved if there is an increase in gross sales, etc.)

The Councilman receives no income, and is not entitled to any income, from the trust. Upon death of surviving trustee (mother), the then existing trust assets will vest one-half to Councilman, if he survives his mother, one-half to his children.

5. Councilman Mulrooney is a Schwinn dealer operating in another City, however, he sells bicycles to the lessee of the trust property which is across the street from the swap meet.
6. The proposed license fee applies to all vendors. The vendors are itinerant in nature with no fixed place of business except as to space provided by operator of swap meet. There are usually an average of 500 vendors daily.
7. The imposition of a business license fee on the vendors and any economic burden so as to affect, if any, a vendor's ability to conduct business is speculative. The normal business license fee would be \$26.00 a year, plus an incremental amount depending on the number of employees, (\$1.50 per employee).
8. Councilman Mulrooney's records reflect approximately 25 bikes are sold to lessee annually. His dealership sells 7,000 to 8,000 bicycles a year!

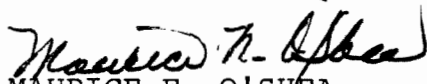
STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
ATTENTION: DIANA FISHBURN  
MARCH 12, 1985  
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- Issue: 1) Is Councilman Mulrooney's interest as a beneficiary under the family trust sufficient to constitute a conflict of interest?
- 2) Does his business of selling bicycles to a business across the street from the swap meet create an interest sufficient to be a conflict of interest?

I realize that these are somewhat involved factual issues. If I can clarify or assist in that regard, please call me at your convenience at 213-630-5913.

The proposed ordinance is scheduled for Council action on April 2, 1985.

Very truly yours,

  
MAURICE F. O'SHEA  
City Attorney  
City of Paramount

MFO/jb

cc: Councilman Mulrooney

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement • • Statements of Economic Interest  
(916) 322-5662 322-5660 322-5901 322-6441 322-6444

April 4, 1985

Gerald A. Mulrooney, Mayor  
William A. Holt, City Manager  
Maurice O'Shea, City Attorney  
City of Paramount  
16400 Colorado Avenue  
Paramount, CA 90723-5091

Beryl Weiner  
Selvin & Weiner  
1900 Avenue of the Stars, Suite 2400  
Los Angeles, CA 90067

Joel Grossman  
O'Melveny & Meyers  
400 S. Hope Street  
Los Angeles, CA 90071

Robert S. Bower  
Rutan & Tucker  
611 Anton Blvd, Suite 1400  
P.O. Box 1950  
Costa Mesa, CA 92626

Re: Your Request for Advice  
Our File No. A-85-065

Dear Sirs:

As you all know, on April 1, 1985, I had conversations with all of you concerning Mayor Mulrooney's obligations under the conflict of interest provisions of the Political Reform Act and the pending City Council decision on an ordinance imposing a business license tax on swap meet vendors in the City of Paramount. As a result of these conversations, it is apparent that there are several issues of material fact on which the City representatives and Mr. Bower, representing the swap meet operator, do not agree. Under Government Code Section 83114(b) we may provide written advice to any person who has duties under the Act upon request. The advice provides a limited immunity from a Commission enforcement proceeding only if the person

Gerald A. Mulrooney, William A. Holt,  
Maurice O'Shea, Beryl Weiner,  
Joel Grossman, Robert S. Bower  
April 4, 1985  
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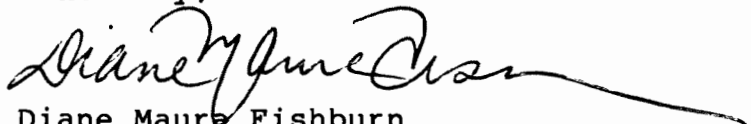
acted in good faith, disclosed truthfully all the material facts and acted in accordance with the advice. In giving advice, we are not fact finders; we do not have the resources nor do we think it is consistent with the statute for us to investigate the facts which underly our advice. Accordingly, it is our conclusion that in this matter we will give advice to Mayor Mulrooney on the basis of the facts that he and his representatives have given to us. If Mr. Bower or his client raise factual issues which the Mayor has not addressed, we will ask the Mayor for his confirmation or explanation of the situation. We will also note in our advice letter when facts are in dispute.

In this matter, it seems crucial whether the effect of the ordinance will be to close or to substantially reduce the swap meet, and both the Mayor and Mr. Bower have stated opposite conclusions on this issue. We cannot independently judge the validity of either conclusion. Therefore, we will give our advice to the Mayor based on the assumption that it will not go out of business. However, we will note that this is a disputed matter.

As a result, our advice to Mayor Mulrooney will be given within the strictures of Government Code Section 83114(b). If Mr. Bower or his client want to pursue this matter further, they have that option.

Assuming that I have all of your submissions by April 10, 1985, I should have a response completed by April 19. I would appreciate it if Mr. Holt could send a copy of any further City submissions to Mr. Bower, and vice versa.

Sincerely,



Diane Maure Fishburn  
Staff Counsel  
Legal Division

DMF:plh

# RUTAN & TUCKER

ATTORNEYS AT LAW

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April 5, 1985

TELEX 910 596-1883  
CABLE ADDRESS RUTAN TUC CSMA

IN REPLY PLEASE REFER TO

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GARVIN F. SHALLENBERGER\*  
JAMES R. MOORE\*  
W. L. IMKEI MCCORMICK\*  
WILLIAM R. BIEL\*  
RICHARD A. CURNUTT\*  
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PAMELA J. JOHNSTONE  
M. KATHERINE JENSON  
DAWN C. HONEYWELL  
SELMA J. MANN  
JANET L. MACLACHLAN  
DAVID A. THOMPSON  
CAROL J. FLYNN  
SCOTT R. PINZONE  
HELEN A. ROBICHAUD  
DEBORAH S. THOREN  
RICHARD G. MONTEVIDEO  
KAREN L. BUSH  
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JOHN M. WRAY  
CAROLE STEVENS  
LEE M. STRAUS  
DANIE I. SPENCE  
KATHY M. FORBATH  
LORI SARNER SMITH

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State of California  
Fair Political Practices Commission  
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Sacramento, California, 95804

Attention: Diane Fishburn

Re: City of Paramount Swap Meet Tax and Potential  
Conflict of Interest of Councilman Mulrooney.

Dear Ms. Fishburn:

This firm represents Modern Development Company, operator of the Paramount Outdoor Market Center (also known as the Paramount Swap Meet). The Paramount City Council is currently considering a proposed ordinance which would impose a new daily business license tax on exhibitors at the Outdoor Market Center. It is our belief that one of the Councilmembers, Councilman Mulrooney, has a conflict of interest with regard to the proposed tax and should therefore disqualify himself as to any actions or discussions concerning same. Enclosed herewith are copies of letters to the Paramount City Council and the City Attorney regarding the proposed swap meet tax and the potential conflict of interest of Councilman Mulrooney. Hopefully they will be of help in the formulation of your Advice Letter, which was requested by the City regarding the Councilman's conflict.

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In order that that you might better understand our belief that Councilman Mulrooney has a conflict regarding the proposed tax, we offer the following information regarding the circumstances of the proposed Council action.

First, the tax, which ostensibly is proposed to recoup the loss of one million dollars to the City due to the abolition of general revenue sharing funds, applies to only one operation in town -- the vendors at the Outdoor Market Center.

Second, the tax to be imposed on this one operation is over five thousand percent (5000%) greater than the annual tax imposed on other vendors in town. A vendor at the swap meet would pay over \$1,300.00 a year under the new tax, while a vendor across the street pays only \$26.00 a year.

Third, Mr. Jay Swerdlow, President of the California Swap Meet Owners' Association, which represents 40% of the licensed swap meets in California (approximately 45 swap meets), testified before the City Council at its March 12 meeting that the proposed tax is well over double any other tax on swap meet vendors and that, if imposed, the tax would force the swap meet vendors who presently sell at the Paramount Outdoor Market Center to relocate to another swap meet, thus driving the Outdoor Market Center out of business. (Mr. Swerdlow is sending a letter under separate cover to the Commission.)

Fourth, we are informed that some of the present members of the City Council have in the recent past sought to eliminate the Outdoor Market Center from the City of Paramount. Indeed, legal opinions were solicited from outside counsel as to how this might be accomplished. Only after the City was advised that the Market Center could not be eliminated outright through traditional zoning or nuisance actions, was the present tax scheme arrived at.

Fifth, comments made by Councilman Mulrooney at the study session on the proposed tax in late February indicate that he intends to use the tax to correct perceived parking and traffic problems in the area of the Outdoor Market Center, so as to benefit the businesses in close proximity to the Outdoor Market Center. Other comments in the past by Councilman Mulrooney

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indicate that he believes the Outdoor Market Center has been responsible for the business problems of members of his family and other businesses in close proximity to the Outdoor Market Center.

Because Councilman Mulrooney is the beneficiary of a trust which owns and leases commercial property directly across the street from the Outdoor Market Center, and because he also supplies bicycles and parts to a bicycle dealer at that location, Councilman Mulrooney clearly has a reportable financial interest which subjects him to the disqualification provisions of Government Code Sections 87100 et seq. (Significantly, the letter dated March 12, 1985, sent to the FPPC from the City of Paramount requesting an Advice Letter indicates that Councilman Mulrooney is the beneficiary of a trust with an irrevocable future right to receive income or principal. His most recent Statement of Economic Interests (Form 721) provided to us by the City of Paramount, dated January 12, 1984, however, states there are "no reportable interests" under Schedule C (Interests in Real Property and Investments Held by Business Entities or Trusts). If, in fact, Councilman Mulrooney held his interest in the above-mentioned trust during the 12 months prior to January, 1984, such interest should have been reported.)

In spite of Councilman Mulrooney's clear financial interest in the property across the street from the Outdoor Market Center, we were advised that the City sought and obtained a tentative opinion from you that Councilman Mulrooney would not have a conflict regarding the proposed tax in that the implementation of the tax would probably not have a material financial effect, different from its effect on the public generally, on Councilman Mulrooney's financial interest.

In light of the circumstances and evidence described above, however, it is readily apparent that the proposed tax will have the intended effect of driving most vendors at the Outdoor Market Center out of the City of Paramount. This will have a significant effect on those commercial properties directly across the street from the Outdoor Market Center, both in terms of reduced competition and in terms of improved parking and traffic circulation. Contrary to the information provided by the City of Paramount, 13 vendors (not 1 as stated by the City) are engaged in bicycle sales at the swap meet, most operating at least five days a week. These vendors sell bicycles ranging from the small "Motocross" bicycles, to the larger "Cruiser" bicycles. Moreover, the Outdoor Market Center also has ten vendors who sell bicycle

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parts and accoutrements, e.g. helmets, gloves, knee and elbow pads, special uniforms, racing tires, etc. Clearly, elimination of this competition will affect the sales of the bicycle shop across the street, which both leases its space from the Mulrooney Trust and purchases bicycles from Councilman Mulrooney's business.

Furthermore, the stall fees paid by the vendors to the operator of the Outdoor Market Center range from \$5.00 on Mondays, Wednesdays and Thursdays, to \$10.00 on Tuesdays and Fridays, to \$15.00 on Saturdays and Sundays. Thus, the daily license tax on vendors amounts to 25% to 50% of the basic stall fees. Between Thanksgiving and Christmas, however, when the daily tax on vendors would be \$5.00 every day of the week, the tax would be 100% of the stall fee on certain days. Again, this would corroborate the drastic effect the proposed tax will have on the vendors.

That the proposed tax will have a direct and beneficial impact upon the financial interests of Councilman Mulrooney and other businesses in close proximity to the Outdoor Market Center, which is distinguishable from businesses throughout the City, is also apparent from the precipitous manner in which the Council is seeking to adopt the measure. The proposed tax has been touted as a revenue-raising measure to replace general revenue sharing funds which have been previously threatened by President Reagan's budget cuts. However, it is now clear that there will be no reductions in general revenue sharing funds until next year, and then the recommendation is only that they be reduced by half. (See Legislative Bulletin, League of California Cities, March 15, 1985.) Despite the obviously ample time the City would have to replace the threatened funds, the City curiously sought to expedite the normal processing of its request for an Advice Letter which would allow the FPPC 21 working days to issue its response, and instead sought to rely upon a tentative opinion. Such pressuring by the City before the FPPC had a chance to investigate all pertinent facts is indicative of the fact that the proposed tax is something other than a revenue-raising measure to replace reduced general revenue sharing funds. Rather, it is clearly an attempt to regulate competition; to rid the City of perceived problems; and to benefit those businesses and properties, including Councilman Mulrooney's, in close proximity to the Outdoor Market Center. (Indeed, during the busiest retail season, between Thanksgiving and Christmas, the proposed ordinance would double the daily license tax on the vendors at the Outdoor Market Center four days out of the week. No other business in the City is subject to this "seasonal adjustment".)



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State of California  
Fair Political Practices Commission

April 5, 1985

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It is quite clear that Councilman Mulrooney, under the circumstances, could not properly participate in the passage of the subject ordinance in an impartial manner, free from bias; nor could he retain the requisite unqualified devotion to his public duty required by the Political Reform Act. Because factors such as reduced competition, changes in traffic patterns, and increases in parking spaces have clearly been shown to require disqualification (see Owen, William L., City Attorney of the City of Davis, 2 FPPC 77 (1976)), and because the proposed business license tax will definitely result in the occurrence of these factors (see letter of Jay Swerdlow, mailed under separate cover), it is respectfully submitted that Councilman Mulrooney should disqualify himself from any discussions or actions regarding the proposed business license tax.

We thank you for your cooperation and consideration of this matter. Should you have any further questions, please do not hesitate to contact me.

Very truly yours,

RUTAN & TUCKER



Robert S. Bower

RSB:rg

cc: Maurice O'Shea,  
City Attorney, City of Paramount

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\*A PROFESSIONAL CORPORATION

City Council  
City of Paramount  
16400 Colorado Avenue  
Paramount, California, 90723

Re: Proposed Daily Business Tax on Exhibitors

Honorable Councilmembers:

This firm represents Modern Development Company, operator of the Paramount Outdoor Market Center (formerly the Paramount Swap Meet), located at 14711 South Paramount Boulevard. On March 12, the Paramount City Council is scheduled to vote on a proposed Ordinance which would impose a new daily business tax on exhibitors at certain defined operations within the City of Paramount.

While the proposed tax, as drafted, would not apply to the Outdoor Market Center, Modern believes the contemplated tax is specifically directed against its operation. Assuming, arguendo, that the Ordinance could be redrafted to include the Outdoor Market Center within its ambit, it is clear the proposed Ordinance would be unconstitutional, both on its face and as applied, in that (1) it is a prohibitive and confiscatory exaction aimed at eliminating the Outdoor Market Center; (2) it is motivated by an animus against racial minorities, lower-income persons and non-resident merchants; (3) it violates State and federal anti-trust laws in that it amounts to a protective trade barrier to stifle competition and benefit local businesses; and (4) it is otherwise arbitrary and unreasonable.

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Clearly, enactment of this business tax will result in the deprivation of the constitutional and civil rights both of Modern Development Company and of businesses and individuals who exhibit their wares at the Outdoor Market Center. And, as the following analysis illustrates, where the law has been clearly established, any immunity defense otherwise available to public officials against personal liability and punitive damages will fail.

THE PROPOSED TAX IS A MERE SUBTERFUGE FOR LEGISLATION DIRECTED AGAINST A PARTICULAR BUSINESS: THE PARAMOUNT OUTDOOR MARKET CENTER.

Although legislative enactments are typically afforded judicial deference, when the totality of relevant circumstances shows a discriminatory intent on the part of the legislative body, the offending legislation will be struck down. When factors such as the impact of official action, the historical background of the decision, the specific sequence of events leading up to the decision, departures from normal procedural sequences and from substantive factors usually considered important, and the totality of relevant factors show a discriminatory intent, the official action will be invalidated. (Village of Arlington Heights v. Metropolitan Development Housing Corp., 429 U.S. 252, 266-268 (1977).) Indeed, in certain instances Councilmembers may be "called to the stand at trial to testify concerning the purposes of the official action. . . ." (Id. at 268.)

When these factors are considered in the present context, it becomes readily apparent that the true purpose of the proposed Ordinance is to severely hamper, and eventually eliminate, the Outdoor Market Center from the City of Paramount.

First, the proposed daily business tax could result in an annual tax on any of the exhibitors at the Paramount Outdoor Market Center of over \$1,300. This constitutes a business tax which is five thousand percent (5000%) higher than the \$26.00 yearly tax on other businesses within the City. (Paramount Municipal Code §26-55.) Moreover, when compared with the vendor taxes in other jurisdictions, it is clear that the contemplated tax is excessive. Other jurisdictions either have no vendor tax whatsoever, (e.g., Costa Mesa, Gardena, La Verne, and Whittier), or have a very small

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tax, amounting to pennies a day (e.g., Long Beach, 38 cents a day; Orange, 50 cents a day). Although Santa Fe Springs has a tax of \$1.00 a day and Colton a tax of \$2.50 a day, these are still far below the proposed amount and can be explained by the fact that the swap meets operate on a limited basis, (e.g., Colton operates only two days per week). Although Pasadena has a percentage of gross receipts tax, this is due to the unique circumstance that the City owns the Rose Bowl, where the swap meet is held. Thus, the tax represents not only a business license fee, but also a rental.

As stated, the proposed tax would be as high as \$5.00 a day, three days out of the week, with a potential total annual tax which is \$1,274.00 more than that imposed on other businesses in the City of Paramount. This excessive and disproportionate exaction is clearly arbitrary and cannot conceivably be justified by the facts.

The general rule is that a license fee or tax must be reasonable in amount, and an excessive exaction is void. (9 McQuillin, Municipal Corporations, §26.32c (3rd Ed. 1978).) And, a municipal license fee or tax that is prohibitive or confiscatory in amount is unreasonable and void as to legitimate activities not subject to outright prohibition by the municipality. (Id. at §26.33.)

Such a radical and disproportionate increase as that contemplated by the Council will have the impact of precluding most, if not all, of the exhibitors subject to the tax from carrying on their business within the City, for most exhibitors are low-grossing operations which are presently not taxed at all. Considered in conjunction with the fact that the new tax would probably apply to but one business operation within the City of Paramount, it is clear that the proposed Ordinance is unconstitutionally discriminatory and confiscatory.

Second, as to the circumstances surrounding the adoption of the proposed Ordinance, it is well known that some of the present members of the City Council have in the past sought to eliminate the Outdoor Market Center from the City of Paramount. Indeed, legal opinions were solicited by past Councils as to how this might be accomplished. Only after these past Councils were advised that the Market Center could not be eliminated outright through traditional zoning or nuisance actions, was the present tax scheme arrived at.

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Moreover, comments on the Ordinance by Councilmembers at the study session two weeks ago indicate that revenue raising is not the purpose of this new tax. Rather, the primary concern seemed to be parking: Councilmember Caldwell expressed that she has great difficulty finding a parking place at the Church because of the Market Center, while Mayor Mulrooney felt that parking problems caused by the Market Center kept other businesses from being effective. These perceived problems, however, do not justify a confiscatory tax which will prohibit the Outdoor Market Center from conducting its otherwise legitimate business. The power to tax for revenue does not convey the power to prohibit. (In re Dees, 50 Cal. App. 11; Merced County v. Fleming, 111 Cal. 46.)

Third, nothing has been suggested that would rationally support the imposition of such an excessive new tax. Reference has been made to the possibility of the end of revenue sharing funds from the federal government. This is a mere pretext. Revenue sharing was adopted in 1972 and was only temporary in nature. Original revenue sharing was to end in 1977, but was extended several times. Even now, there is no possibility of the elimination of revenue sharing funds until September at the earliest. Thus, implementation of the proposed tax some seven months before even the possibility of the elimination of revenue sharing is obviously premature, not only in time, but in light of the heavy lobbying going on to keep revenue sharing alive. Even were revenue sharing eventually eliminated, the inequity of trying to recoup these funds by taxing one particular business in the City is readily apparent.

Finally, previous statements by members of the Council have revealed a strong desire for retribution against the Outdoor Market Center for "personal injustices" which certain Councilmembers perceive as having been caused by the operation of the Market Center. Indeed, Mayor Mulrooney has specifically blamed the Market Center for the financial hardships of certain family members and of other local businessmen in town. The proposed tax is clearly an attempt to "get even".

As stated, however, the courts will not countenance legislation aimed at the elimination of an otherwise legitimate business. The only inference that can be drawn from the totality of factors surrounding the contemplated tax proposal

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is that it is a mere subterfuge for legislation directed against the Paramount Outdoor Market Center.

THE PROPOSED ORDINANCE IS MOTIVATED BY ANIMUS AGAINST RACIAL MINORITIES AND LOWER-INCOME PEOPLE.

The contemplated Ordinance potentially impacts only one business within the City of Paramount -- a business largely composed of racial minorities and lower-income people. The impact of the regressive proposal now before the Council would be to drive these people from within city limits. Again, the totality of factors surrounding implementation of the proposed tax, discussed above, show the discriminatory purpose behind the proposed legislation, while absolutely nothing in the record supports either the classification drawn by the Council (between Swap Meet exhibitors and other retailers within the City) or the disproportionate and excessive taxes to be allocated to Swap Meet vendors. A more arbitrary and irrational scheme can hardly be imagined.

-- THE PROPOSED ORDINANCE AMOUNTS TO A PROTECTIVE TRADE BARRIER BENEFITING LOCAL BUSINESSES AND VIOLATING ANTI-TRUST LAWS.

The only apparent distinction between exhibitors who sell from the Outdoor Market Center and other retailers within the City is that exhibitors do not operate out of a fixed place of business within the City. Resident dealers and businessmen, however, are not entitled to have city government intervene on their behalf to protect them from "outside" businesses. The disproportionately heavier tax upon "out-of-town" vendors thus is not only discriminatory, but violative of anti-trust laws as well.

The courts are not reluctant to strike down such ordinances. In County of Alameda v. City and County of San Francisco, 19 Cal. App. 3d 750 (1971), the Court overturned a local income tax fee imposed on non-San Francisco residents, since it denied equal protection to non-residents.

In Ex Parte Frank, 52 Cal. 606 (1878) an ordinance imposing a fee of \$2,000 per quarter on out-of-city classes of business, while imposing a fee on similar in-city businesses of only \$100.00 per quarter, was overturned as "flagrantly unjust, oppressive, unequal and partial". (Significantly, this case dealt with a disparity of 2000 percent, while the City of Paramount's Ordinance would impose a

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disparity of 5000 percent between Swap Meet Vendors and other retailers with fixed places of business within the City.) (See also, In re Hines, 33 Cal. App. 45 (1917) (ordinance fixing flat fee of \$12.00 on local laundries and fee of \$130.00 on outside laundries invalid); Bueneman v. City of Santa Barbara, 8 Cal. 2d 405 (1973) (license fee imposed only on laundry business where work was not done within the city held invalid; "discrimination cannot go to the extent of being a mere subterfuge for legislation directed against a particular group of taxpayers"); Continental Baking Co. v. City of Escondido, 21 Cal. App. 2d 388 (1937) (although tax upheld, court noted that tax upon one class cannot be so disproportionately heavy as to demonstrate that the classification is a mere subterfuge for legislation directed against a particular group of taxpayers); and Silversten v. City of Menlo, 17 Cal. 2d 197 (1941) (although tax upheld, court noted that where it appeared from gross disparities between the taxes paid by different taxpayer groups and from extraordinarily large extractions from one group as opposed to another that the real intent of the ordinance was not to raise revenue but to destroy the business of non-residents in order to protect the interests of resident businessmen, there is a denial of equal protection; and, any attempt to create tariff barriers in favor of local business would be unconstitutional).)

It has long been held that ordinances cannot be used to establish monopolies. (See, e.g., Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211 (1925); In Re White, 195 Cal. 516 (1925).) Moreover, in 1978, the United States Supreme Court removed the cloak of immunity from the federal antitrust laws (Sherman Act, 15 U.S.C. 1-7; Clayton Act, 15 U.S.C. 12-27) previously enjoyed by local public agencies. (City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978).) It is readily apparent that the use of the taxing power to regulate competition, the obvious motivation in the instant case, would thus be prohibited.

THE CITY HAS OTHERWISE ACTED IN AN ARBITRARY MANNER.

In the sequence of event leading up to the consideration of this ordinance, the City has consistently acted in an arbitrary and capricious manner. Examples abound.

First, the City has recently refused to issue a business license under the current business license ordinance to

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Modern Development Company for operation of the Outdoor Market Center for the first six months of 1985. The reason stated for refusing the license was that the application did not list a permanent address. The fact that the Outdoor Market Center has operated at the same location for the past 30 years, and that the City has heretofore issued business licenses based upon applications listing the same address as is now deemed "insufficient", show that the City has denied Modern a business license on a mere pretext. Plainly, the City is stalling Modern's application until the new tax can take effect.

Secondly, when the Chamber of Commerce indicated that it would oppose the contemplated business tax, the Chamber was informed that the City would withdraw its \$18,000 annual support of the Chamber if it did so. This blatant economic blackmail and attempt to stifle reasoned opposition to the City's precipitous attempts to rid the City of the perceived nuisance of the Paramount Outdoor Market Center is also indicative of the shabby manner in which the City has dealt with Modern's constitutional and civil rights.

Moreover, the City has seen fit to prevent dissemination to the public of the staff report regarding the proposed tax until the last minute. The City has thus deviated from the normal procedural sequence of events, again apparently to preclude thoughtful opposition to the proposed ordinance.

Finally, it should be noted that local governmental entities are strictly liable for the violation of federal civil rights. (Owen v. City of Independence, 445 U.S. 622 (1980).) In evaluating liability for civil rights act violations (42 U.S.C. § 1983), two questions need to be asked:

Is the conduct complained of that of persons acting under color of state law? and

Did the conduct deprive plaintiff of any right, privilege or immunity protected by federal law or the constitution?

If the answers to both these questions are "yes", as they clearly would be if the proposed ordinance is passed, liability and compensatory damages, punitive damages and attorneys' fees (42 U.S.C. § 1988) will follow.



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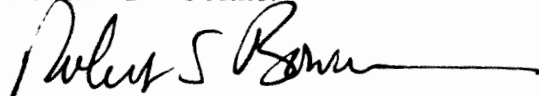
March 12, 1985

Moreover, councilmembers may be held personally liable in damages for their official actions and may even be assessed punitive damages for particularly wrongful conduct, i.e., for disregard of clearly established law. (City of Newport v. Fact Concerts, 453 U.S. 247 (1981); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).)

We thank you for your consideration of this significant matter. The Paramount Outdoor Market Center has over 600 merchants, most of which are entirely dependent upon this operation as their only means of support. Additionally, Modern Development Company engages some 150 employees to manage and maintain all factions of the business. It would be a manifest injustice to destroy all of these City and general public advantages with this ill-conceived business tax. We are confident that if the tax is adopted, it will be overturned after what will perhaps be a long and expensive battle. We are prepared, however, for the battle, for we refuse to permit the imposition of any tax upon our merchants other than one which is fair and applicable to all other markets or small businesses in the City.

Very truly yours,

RUTAN & TUCKER



Robert S. Bower

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\*A PROFESSIONAL CORPORATION

Mr. Maurice O'Shea  
City Attorney  
City of Paramount  
16400 Colorado Avenue  
Paramount, California 90723

Re: Proposed Business License Fee for Swap Meet Vendors

Dear Mr. O'Shea:

This firm represents Modern Development Company, operator of the Paramount Outdoor Market Center (formerly the Paramount Swap Meet), located at 14711 South Paramount Boulevard. On March 12, the Paramount City Council is scheduled to vote on a proposed City Ordinance which would impose new and excessive license fees on exhibitors doing business within the City of Paramount. We have submitted a letter regarding the constitutional infirmities of the proposed tax, but submit this separate letter regarding a potential conflict of interest of Mayor Mulrooney with regard to the subject ordinance.

We have been informed that Mayor Mulrooney, the apparent sponsor of the proposed ordinance, at one time owned and operated a Schwinn Bicycle franchise within one block of the Paramount Outdoor Market Center. We have been informed that although Mr. Mulrooney no longer owns this shop, he is the beneficiary under a family trust which owns property within the vicinity of the Outdoor Market Center and also is the supplier of bicycles and bicycle parts to the current lessee of the bike shop.

For a number of years now, vendors within the swap meet have also offered for sale bicycles and bicycle-related products simi-

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Mr. Maurice O'Shea  
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lar to those sold in the past by Mayor Mulrooney and now supplied by him to the bike shop across the street. In the past, our client has specifically been advised by Mayor Mulrooney that the operation of the swap meet with its sales of bicycles adversely affected his business and the businesses of his father.

Based upon Mayor Mulrooney's financial interests and statements, we submit that Mayor Mulrooney has a conflict of interest and thus should disqualify himself from participation on the proposed ordinance.

Under Section 87100 of the California Government Code,

No public official at any level of State or Local Government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

Under Section 87103, a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, different from its effect on the public generally, on (1) a business entity which the public official has an investment greater than \$1,000; (2) any real property which said official has a direct or indirect interest worth more than \$1,000; (3) any source of income other than certain gifts and loans, aggregating \$250 or more within the past twelve months; (4) any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management; or (5) any donor of gifts aggregating \$250 or more in value received by or promised to the official within twelve months prior to the time of the decision.

A public official may be enjoined from violating these provisions or may be compelled to comply with them. (See Gov. Code §§ 87102, 91003.) Moreover, where it is determined that a violation has already occurred, the official action taken in accordance with the violating official's participation may be set aside as void if the action may have not otherwise been taken or approved. (Gov. Code § 91003).

That disqualification is required is clear from FPCC opinions regarding councilmen in similar situations. In Oglesby, Thomas, W., City Manager of Antioch, 1 F.C.C.P. 71 (1975), a city council-

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Mr. Maurice O'Shea

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man was disqualified from participating in the decision to adopt a city redevelopment plan, due to his ownership interest in three properties in the project area and in two investment lots outside of the redevelopment area, but within a few blocks of the redevelopment project.

In Owen, William L., City Attorney of the City of Davis, 2 F.P.P.C. 77 (1976), the Commission again determined that a local public official should disqualify himself from participating in a decision to adopt a land use plan for the city. There, the City had set aside a 23 square block area as a core area in which the Planning Commission and the City Council could make significant policy decisions regarding expansion of commercial facilities, changes in traffic patterns, and increases in parking spaces. Such decisions would have the effect of either preserving the status quo in terms of the number and variety of commercial enterprises within the area or otherwise allowing significant expansion of such development. The adoption of the core area plan was found to have a significant financial effect on the value of holdings in real property and commercial business establishments within and near the core area, and thus a planning commissioner, who owned a vacant lot within the existing commercial zone of the core area upon which he was constructing a commercial building, was found to have a possible conflict of interest.

Similarly, in Thorner, Tom 1 F.P.P.C. 198 (1975), the Commission held that a director of a municipal water district holding significant interests in business entities which could be affected by the District's decisions on requests for variances from a moratorium on new water connections, could not participate in such decisions or requests, since the decisions could have a reasonably foreseeable financial effect on the business entities in which the director held an interest. The Commission additionally found that the director also could not participate in the discussions of the Board of Directors on the feasibility of lifting the moratorium. One specific director was the Executive Vice President, a salaried employee and a minority stockholder of a closely held family corporation which sold ready-mix concrete, major appliances, fuel, and sheet metal type products. A conflict arose when an applicant for water for a project within the district came before the board of directors for a variance, since the director's corporation could potentially supply some of the products to the project.

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In concluding that the financial effect was reasonably foreseeable, the FPPC specifically noted that the ultimate test was whether the officials "unqualified devotion to his public duty" might be impaired. (Id. at 206, citing People v. Darby, (1952) 114 Cal.App.2d 412, 433).

In Gillmor, Gary G., Mayor, City of Santa Clara, 3 F.P.P.C 38 (1977), the FPPC again held that a City Councilman was required to disqualify himself from voting on the rezoning of certain property to permit the construction of a 9-story senior citizens housing complex with the ground floor space for rental to small commercial shops. A conflict arose since the mayor carried on commercial businesses of his own and leased property to other commercial businesses on six parcels of real property located several hundred feet from the planned development in question. In holding that the mayor should disqualify himself under § 87100, the FPPC stated that "we think it is clear that the existence of Mayor Gillmor's multiple-financial interest might interfere with his ability to perform his duties relative to the rezoning issue 'in an impartial manner free from bias'. Accordingly, we conclude that the Mayor is prohibited from making, participating in making, or in any way attempting to use his official position to influence the rezoning decision." (See also Sankey, Iris, Member of State Board of Equalization, 2 F.P.P.C. 157 (1976); Brown, MacKenzie, F., City Attorney, City of San Clemente, 4 F.P.P.C. 19 (1978)).

In accordance with these opinions, where a public official, such as Mayor Mulrooney herein, is faced with the situation where he cannot properly carry out his unqualified devotion to his public duty because of a competing conflicting interest which benefits or harms his own personal interest, then such person must disqualify himself from voting or participating in the decision-making process.

In the current situation, it is quite obvious that given Mayor Mulrooney's interest in the property across the street, which is leased to commercial businesses in competition with the Outdoor Market Center, and the fact that the nearby bike shop constitutes a source of income aggregating over \$250 a year to Mayor Mulrooney, it is clear that Mayor Mulrooney could not properly participate in the passage of the ordinance in an impartial manner free from bias, and that he could not retain the requisite unqualified devotion to his public duty.

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It is our belief that upon your own independent study of this matter that you will come to the same conclusions that we have; therefore, it is our hope, especially in light of the personal liability and penalties involved for knowing violation of the Political Reform Act, that you will properly advise Councilman Mulrooney of his duty to disqualify himself from voting on the ordinance at issue. Should you have any doubts as to the proper course of action, I would urge you to seek an advice letter from the Fair Political Practices Committee.

We thank you for your cooperation and consideration of this matter.

Sincerely,

RUTAN & TUCKER

A handwritten signature in dark ink, appearing to read "Robert S. Bower", with a long horizontal flourish extending to the right.

Robert S. Bower

cc: City Council